Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	)	GN Docket No. 04-54

REPLY COMMENTS OF VERIZON ON THE FOURTH NOTICE OF INQUIRY

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Introduction and Summary

The broadband market is developing on a competitive basis, but continued investment in broadband has been hampered by the existing uneven regulatory landscape, in which local telephone companies, but none of their competitors, face common-carrier regulation and the *Computer II/III* rules. This biased regulatory regime has skewed competition and dampened investment incentives for local telephone companies and their competitors alike. As a result of the regulatory disincentives to investment, the United States has slipped out of the top ten countries worldwide in broadband penetration, despite robust intermodal competition among cable modem providers, telephone companies, satellite operators, terrestrial wireless systems, and electric utilities. The Commission should act quickly to stop our nation's slide in the international league tables by reforming the regulatory environment.

As Verizon outlined in its initial comments, the Commission urgently needs to finish the job it started in the *Triennial Review Order* in eliminating unbundling for broadband services. To the extent some commenters now ask the Commission to reconsider and roll back certain provisions of the *Triennial Review Order,* these requests are ill founded and must be rejected.

In addition to clarifying its elimination of broadband unbundling requirements, the Commission should adopt a uniform national policy for broadband services. By putting telephone companies and their competitors on an equal regulatory footing in this way, the Commission will permit market forces to more efficiently drive deployment of new broadband offerings. As market developments since the adoption of the *Triennial Review Order* demonstrate, unleashing market forces in broadband stimulates both supply and demand.

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., which are identified in Attachment A hereto.

Finally, the Commission should adopt a definition of broadband that includes packet-switched or successor technologies, regardless of speed, and should resist calls by some commenters to define broadband as limited to services that operate at speeds attainable only with next-generation technologies, such as fiber to the premises. By establishing a clear, broadly deregulatory, truly uniform national broadband policy, the Commission can create a regulatory environment in which market forces will drive the deployment of a ubiquitous broadband infrastructure in this country that is second to none.

Discussion

I. The Broadband Mass Market Is Competitive

Today, the cable modem, DSL, satellite, fixed and mobile wireless, and broadband-over-power-line ("BPL") platforms offer mass-market consumers (including small and medium-sized businesses) a variety of broadband services, and they are poised to expand their deployment in the near future.[2] In addition, next-generation broadband networks, including fiber to the premises ("FTTP"), are becoming increasingly available, thanks in part to a major investment initiative by Verizon, which hopes to make FTTP available to one million premises by the end of 2004.[3] Despite the positive overall outlook for broadband deployment, however, several key areas of regulatory unfairness and uncertainty remain. In order to fulfill its Section 706 mandate, the Commission should, at long last, adopt a comprehensive national broadband policy that treats telephone companies like all their competitors in their provision of broadband, and

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[2] *See* Comments of Verizon on Fourth Notice of Inquiry at 5-14 (FCC filed May 10, 2004) ("Verizon Comments"); Comments of the United States Telecom Association at 3-5 (FCC filed May 10, 2004) ("USTA Comments"); Comments of Comcast Corp. at 6-14 (FCC filed May 10, 2004) ("Comcast Comments").
[3] *See* Verizon Comments at 14-15.

that creates an environment conducive to the deployment of next-generation broadband facilities and services.

AT&T erroneously claims that "satellite, fixed wireless and public utilities have virtually dropped out of sight, having failed to become viable alternatives to cable or to DSL."[4] Nothing could be further from the truth – as AT&T itself in effect admits two pages later, when it states that BPL and wireless systems "have the potential to emerge as robust competitors."[5] It is particularly appropriate to consider emerging or potential competition in a nascent market like broadband, where even the more established technologies, like cable and DSL, still serve only a small percentage (less than a quarter) of the total potential customer base. "Explosive growth of the kind that the broadband transport industry is currently undergoing can render the network externalities largely irrelevant," and enable new entrants to make rapid gains in the market.[6] The Commission implicitly recognized this in the *Triennial Review Order*, when it found that intermodal competition "helps alleviate any concern that competition in the broadband market may be heavily dependent upon unbundled access."[7] Indeed, the Commission has repeatedly

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[4] Comments of AT&T Corp. at 2 (FCC filed May 10, 2004) ("AT&T Comments"); *see also* Comments of MCI, Inc. at 6-7 (FCC filed May 10, 2004) ("MCI Comments").
[5] AT&T Comments at 4.
[6] *See* C. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. on Reg. 171, 280 (2002) ("'If a market is growing rapidly, the number of users who have made commitments to any standard is small relative to the number of future users.' In such cases, the fact that a particular firm may currently dominate a market is of little consequence. People concerned about lock-in will focus on the size of the network that will exist in the future, not the size of the one that exists today.") (quoting S.J. Liebowitz & S. Margolis, *Should Technology Choice Be a Concern of Antitrust Policy?*, 9 Harv. J.L. & Tech. 283, 310, 312 (1996)) (footnotes omitted).
[7] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17136, ¶ 263 ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

found that the preconditions for monopoly appear to be absent from the broadband market,[8] and no commenter provides any reason to suppose that local telephone companies have market power in broadband.

Some commenters wrongly attempt to attribute monopoly power to telephone companies without considering the dominant position of the cable modem companies that control two thirds of the market (as MCI attempts to do when it speaks of "the DSL market" or "[m]onopolization of Internet broadband services over copper plant"[9]). "That kind of "naked disregard of the competitive context" is precisely what prompted the D.C. Circuit to vacate the Commission's line-sharing rules.[10] Any attempt by the Commission to impose common-carrier regulation on telephone-company broadband (on the basis of the putative market power of telephone companies) while failing to do the same to cable companies would be similarly rejected.

AT&T, MCI and other competitive carriers misleadingly speak of a "duopoly" between cable and DSL, as if there were only one cable company and one DSL provider in the country, rather than multiple providers on each platform. Even leaving that simple fact aside, however, the duopoly argument fails on its own terms. The reality is that cable companies still control approximately *two-thirds* of all high-speed lines provided to mass-market customers, and more customers subscribe to cable modem service each quarter than to DSL, despite significant price

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[8] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("The Commission's own findings (in a series of reports under § 706 of the 1996 Act) repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market.") ("*USTA I*"); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398 2404, ¶ 12, 2423-24, ¶ 48 (1999) ("First Advanced Services Report"); Second Report, 15 FCC Rcd 20913, 20917-18, ¶ 8, 20943, ¶ 72 (2000); Third Report, 17 FCC Rcd 2844, 2864, ¶ 44, 2877-82, ¶¶ 77-88 (2002).

[9] MCI Comments at 12, 13.

[10] *USTA I*, 290 F.3d at 429.

decreases by DSL providers.[11] Indeed, AT&T *completely ignores the significant DSL price cuts of recent months*, which spurred a significant competitive response from cable companies, who have increased their speeds (thus reducing the effective price of bandwidth) and offered aggressive promotional discounts.[12]

Head-to-head comparative advertising by cable modem and DSL providers offers additional evidence that they are competing fiercely for the same customers in the same markets.[13] A recent Verizon television ad pointed out that Verizon's service costs "13 bucks less than Comcast," and, unlike Comcast includes a pop-up blocker, antivirus software, and modem. Within weeks, Comcast aired a copycat advertisement – using the same set, format, and body double.[14] Media analysts have noted that telephone companies have boosted their direct-mail marketing efforts "primarily due to cable companies' more aggressive marketing of packages with cable modem."[15]

Furthermore, the competition between cable modem and DSL services extends to small and medium-sized business customers as well as residential customers. Five of the six largest

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[11] *See Broadband Competition: Recent Developments, March 2004* at 1-2, attachment to *Ex Parte* Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-337, 01-338, 02-33, and 02-52 (FCC filed Mar. 26, 2004), and also attached as Exh. A to Verizon Comments ("*Broadband Competition Update*"); *see also* Comments of SBC Communications, Inc. at 11 (FCC filed May 10, 2004) ("SBC Comments"); J. Halpern, *et al.*, Bernstein Research, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q*, at 4 (Mar. 10, 2004) ("DSL continues to lag cable in absolute number of additions.").

[12] *See* Verizon Comments at 7; *Broadband Competition Update* at 4-5 & Tables 2 & 4.

[13] Examples of recent advertisements are summarized in the *Broadband Competition Update* at 8.

[14] Transcript of Verizon Online DSL advertisement aired on Feb. 4, 2004 at 5:58 A.M. on WNBC in New York, NY. The Comcast ad was subsequently pulled off the air, in response to copyright and other challenges made by Verizon.

[15] *MINTEL's Comperemedia: Telecom Companies Push Bundled Services Packages*, Business Wire (Mar. 9, 2004).

cable system operators (which, collectively, represent over 90 percent of consumer cable modem subscribers) already offer broadband services specifically tailored to small businesses.[16] As Verizon has previously explained, these cable operators have acknowledged that they can readily reach most small-business customers with their existing infrastructure, and that it makes sense to serve them.[17] Indeed, these cable operators already have been very successful in attracting small-business subscribers,[18] and several studies have confirmed that more small and medium-sized businesses rely on cable modem service than on DSL. *See* Verizon Comments at 7-8 (summarizing studies).[19]

These developments confirm that the broadband market is developing in a competitive manner, that no telephone company could exercise market power in broadband. To say that the broadband market exhibits competition is not to say that all is well, however. As discussed below, the Commission must act quickly to remove regulatory impediments to investment that threaten to hinder additional deployment (particularly in next-generation facilities and services).

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[16] *See* M. Lauricella, *et al.*, Yankee Group, *Cable MSOs: Ready to Take Off in the Small and Medium Business Market* at 4 (Mar. 2002).

[17] *See, e.g.*, A. Figler, *Turning Businesses into Customers*, Cable World (Dec. 9, 2002) (Ken Fitzpatrick, senior vice president of commercial services for Time Warner Cable: "We've got an infrastructure there that is just ripe for commercial services. . . . We pass 1.2 million businesses."); Jason Livingood, Director of Comcast Commercial Internet Services, *Overview of Cable Modem Offerings for Businesses in Maryland* (Aug. 15, 2002) (Comcast targets "SMBs with 1-100 employees," "Non-profit orgs, schools, government," and "SMBs and Enterprises with telecommuters.").

[18] *See, e.g.*, *A Snapshot of the Cox Business Strategy*, Interview with Coby Sillers, Vice President and General Manager for Cox Business Services, Xchange Mag. (June 1, 2003) ("Cox Business Services now serves more than 65,000 business customers, and the company's business efforts have grown in the past three years from less than 1 percent of Cox's overall revenue to just more than 5 percent of Cox's consolidated revenue."); J. Barthold, *Small Business, Big Money, No Guarantees*, TelephonyOnline.com (Aug. 12, 2002) (Kevin Curran, senior vice president of marketing and sales for Cablevision Lightpath: Cablevision "can't keep up with demand" for Cablevision's Business Class Optimum Online service for small businesses).

[19] *See also Broadband Competition Update* at 3-4.

II. The Commission Should Clarify Its Unbundling Rules for Mass-Market Broadband

A. The Commission Should Resolve Three Ambiguities That Blunt the Procompetitive Effect of the *Triennial Review Order*

The Commission based its decision not to require unbundling of FTTP loops provided to mass-market customers on the principle that, "with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements," both incumbent LECs *and* competing carriers will have strong new incentives to deploy new facilities and services so that, in the end, "consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services."[20] The D.C. Circuit specifically approved this rationale on appeal.[21] Unfortunately, as explained in Verizon's opening comments, the rules adopted in the *Triennial Review Order* do not provide the intended certainty that Verizon and other incumbent telephone companies will be able to benefit from their broadband investments.[22]

The Commission should act quickly to resolve three key areas of ambiguity in the *Triennial Review Order*. *First*, the Commission should therefore forbear from applying any unbundling requirements for broadband that section 271 might be construed to impose. *See* Verizon Comments at 17-18.[23] *Second*, the Commission should establish a bright-line rule to distinguish between mass-market and enterprise customers for purposes of its broadband

[20] *Id.*
[21] *See USTA II*, 359 F.3d at 584.
[22] *See also* SBC Comments at 20-22.
[23] *See also* Response of Verizon to Petitions for Reconsideration at 7-15, CC Docket Nos. 01-338, 96-98, & 98-147 (FCC filed Nov. 6, 2003) ("Verizon TRO PFR Response"); Consolidated Reply of Verizon to Oppositions to Petitions for Reconsideration or Clarification at 4-9, CC Docket Nos. 01-338, 96-98, & 98-147 (FCC filed Nov. 17, 2003) ("Verizon TRO PFR Consolidated Reply").

unbundling regulations. *See* Verizon Comments at 18-21.[24] *Third*, the Commission should make clear that the rules for FTTP to serve mass-market customers apply to mass-market customers multi-unit premises and that its definition of FTTP applies to any situation where fiber is deployed to a multi-unit building, regardless of whether the fiber continues to the individual units within that building. *See* Verizon Comments at 21-23.[25]

Naturally, some competitive LECs, like AT&T and MCI, who have persistently opposed any regulatory relief for incumbent local telephone companies, and who were virulent opponents of the *Triennial Review Order*, now oppose any further clarification of that order. But beyond some vague notion that the incumbent local telephone companies have already received more relief in the *Triennial Review Order* than they are entitled to, these commenters offers no sound reason to deny the requested clarification.

Some commenters, like MCI and Covad, essentially ask that the *Triennial Review Order* be repealed.[26] In particular, MCI asks that the Commission "re-examine its recent rules that blocked competitors from gaining broadband access to incumbent LEC last mile fiber facilities."[27] But the Commission has specifically found that "the entry barriers appear to be largely the same for both incumbent and competitive LECs" and that "competitive LECs are currently leading the overall deployment of FTTH loops after having constructed some two thirds or more of the FTTH loops throughout the nation."[28] And it also found, correctly, that

[24] *See also* Verizon TRO PFR Response at 15-21; Verizon TRO PFR Consolidated Reply at 9-19.
[25] *See also* Verizon TRO PFR Response at 21-25; Verizon TRO PFR Consolidated Reply at 19-23.
[26] MCI Comments at 10-11; Comments of Covad Communications at 1-3 (FCC filed May 10, 2004) ("Covad Comments").
[27] MCI Comments at 11.
[28] *Triennial Review Order*, 18 FCC Rcd at 17143, ¶ 275.

refraining from unbundling would enhance incentives to deploy new fiber networks by incumbents and competitors alike.[29] In other words, there is no reason why MCI cannot build its own fiber network rather than seeking a free ride on networks to be built by others.

In one of the more bizarre comments submitted in this proceeding, MCI seems to argue that it has somehow purchased the right to keep the regulatory shackles on telephone companies because it "has expended significant resources at the Commission, in the Courts and on Capitol Hill" lobbying for policies that were rejected in the *Triennial Review Order*.[30] Lobbying expenditure alone is, of course, not a good predictor of success in achieving policy goals – particularly since MCI's principal policy objective seems to have been to avoid having to invest in competing infrastructure. Perhaps MCI's "significant resources" would have been better spent on building competitive facilities, as Congress intended.

B. The Commission Should Not Revisit Its Decision Not To Require Mandatory Line Sharing

Some commenters, notably Covad, devote their comments largely to a plea for the Commission to require mandatory line sharing at near-zero cost.[31] The Commission first attempted to introduce mandatory line sharing in 1999 but did not consider whether the policy was justified in light of intermodal broadband competition. As a result of that oversight, the D.C. Circuit vacated the Commission's *Line Sharing Order* in *USTA I*.[32] On remand, the record showed that competitors do not need line sharing in order to compete, that line sharing has had

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[29] *Id.* at 17141, ¶ 272.
[30] MCI Comments at 10.
[31] Covad Comments at 6-11; Comments of MTCO Communications, Inc. at 3-7 (FCC filed May 10, 2004) ("MTCO Comments").
[32] *See* Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated*, *USTA I*, 290 F.3d 415.

no significant effect on broadband competition, and that mandatory line sharing has a negative effect on the investment incentives of incumbent LECs and competitors alike. Accordingly, the Commission quite properly declined to require mandatory line sharing in the *Triennial Review Order*, and the D.C. Circuit upheld the Commission's decision in *USTA II*.[33]

In arguing that the Commission could properly impose line sharing today, Covad ignores the basis of the D.C. Circuit's original vacatur of the Commission's line-sharing rules. The D.C. Circuit chastised the Commission for failing to consider the existence of competition from cable modem service and other competitive alternatives – an omission that left the Commission with no valid reason to believe that ordering line sharing "would bring on a significant enhancement of competition."[34] The court noted that "mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource."[35] Any effort to impose line sharing must fail for the same reason that the Commission's original attempt to impose line-sharing failed: to require mandatory unbundling of the high-frequency portion of the loops requires a finding of impairment that the record simply does not support, given the healthy intermodal competition in the broadband marketplace.

Indeed, in upholding the Commission's decision in the *Triennial Review Order* not to impose line sharing, the D.C. Circuit explained, "We read the Commission as concluding that, at least in the future, line sharing is not essential to maintain robust competition in this market, a conclusion based on permissible considerations and supported by evidence in the record."[36]

[33] *USTA II*, 359 F.3d 554.
[34] *USTA I*, 290 F.3d at 429.
[35] *Id.*
[36] *USTA II*, 359 F.3d at 585.

Moreover, the Court found that "even if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment" – namely, the negative impact on investment and deployment that mandatory unbundling would entail.[37]

Covad's suggestion that line sharing played a significant role in driving broadband deployment is pure fantasy; the minuscule fraction of the market served via line sharing refutes this idea.[38] As Verizon has previously documented, line-sharing is competitively insignificant; it accounts for less than 1% of all broadband connections in a marketplace dominated by cable modem service.[39] The figures cited by MCI in these proceedings confirm this result.[40] Moreover, Verizon has submitted evidence indicating that even the complete exit of competitive DSL providers "would not be expected to affect the price that ILECs could charge for ADSL services."[41] Confirming this point, the Commission concluded in the *Triennial Review Order*, as the D.C. Circuit approvingly noted, that "intermodal competition in broadband, particularly from cable companies, means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources."[42]

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[37] *Id.*
[38] Covad Comments at 6-7.
[39] *See, e.g.*, Verizon TRO PFR Response at 41-42 (analysis of former Bell Atlantic territory indicated that line sharing accounts for less than 1% of broadband connections).
[40] MCI Comments at 7. Relying on data from the Commission, MCI states that there are a total of 23.5 million high-speed lines, of which 7.7 million are DSL lines, and that non-incumbent LECs account for 5.4% of ADSL lines. Even assuming for the sake of simplicity that *all* DSL is ADSL, non-incumbent LECs would account for, at most, 415,800 lines (7.7 million x 5.4% = 415,800), or 1.7% of all high-speed lines (415,800 / 23.5 million x 100 = 1.7%). Since most SDSL is provided via stand-alone loops and much ADSL is provided via line splitting, the actual fraction of the market served by line sharing must be *less* than 1.7%.
[41] Reply Declaration of Dennis W. Carlton, Hal S. Sider, and Gustavo Bamberger, ¶ 24, attached as Exhibit A to Reply Comments of Verizon, CC Docket No. 01-337 (FCC filed Apr. 22, 2002).
[42] *USTA II*, 359 F.3d at 580 (citing *Triennial Review Order*, 18 FCC Rcd at 17151, ¶ 292).

Market developments since the issuance of the *Triennial Review Order* provide further confirmation that the *elimination* of line sharing has had procompetitive effects. Far from leading to reduced investment and higher prices, as Covad direly predicted, the elimination of line sharing has been accompanied by unprecedented price cuts, higher speeds, and new service packages for consumers. Moreover, Verizon – not any competitive LEC – was the leader in cutting DSL prices. Although Covad claims to have lowered prices to a "previously unheard of" $39.95 per month in June, 2003,[43] Verizon had lowered prices to $34.95 a month earlier (or $29.95 when bundled with phone service), while increasing download speeds to 1.5 Mbps from 768 kbps.[44] Just this month, Verizon announced an additional tier of consumer DSL service with a maximum connection speed of 3 Mbps/768 kbps.[45] Since the adoption of the *Triennial Review Order*, Verizon has invested hundreds of millions of dollars to increase the availability of its DSL services. In 2003, Verizon had added more than 10 million new DSL-qualified lines, and Verizon currently plans to add an additional seven million new lines by the end of 2004.[46] This flourishing of competition fatally undermines Covad's claims that line sharing was somehow a spur to increased deployment and lower prices. Plainly, just the opposite is true.

Equally flawed is Covad's claim that that line sharing is desirable because line splitting "is not at this time a viable alternative."[47] Even if that were true (and it is not), it would be of little or no relevance to the question whether to require mandatory line sharing because, once

[43] Covad Comments at 8 (describing TeleSurfer Link product priced at $39.95 per month, with teaser price of $21.95 for the first four months).
[44] *See* Declaration of Jerome Holland, ¶¶ 3-4, CC Docket No. 01-338 (FCC filed Mar. 29, 2004) ("Holland Decl."), attached as Exhibit B to Verizon Comments, GN Docket No. 04-54 (FCC filed May 10, 2004); *see also Broadband Competition Update* at Table 4.
[45] *See* Verizon Press Release, *Verizon to Expand DSL Offerings With New, Higher-Speed Service and Voice-Over-IP Package* (May 4, 2004).
[46] *See* Holland Decl. ¶ 3.
[47] Covad Comments at 10.

again, Covad focuses exclusively on the telephone platform and fails to acknowledge the effects of intermodal competition. In any event, the Commission has already expressly found that "Covad's argument that . . . there are no third-party alternatives to" line sharing was not "credible" in light of *Covad's own public statements* that line splitting provides a viable commercial strategy.[48] Covad has acknowledged that "[e]ven before the FCC decision we were accelerating our focus towards line-splitting agreements with bundles of voice and data services for residential customers as demonstrated by our agreements with AT&T and Z-Tel."[49] And after the issuance of the *Triennial Review Order*, Covad publicly touted its "'business strategy to sign up both national and regional line-splitting partners and capitalize on the growing demand for bundled voice and data services.'"[50] According to press reports, line splitting provided 29% of Covad's net line additions in the fourth quarter of 2003.[51] Covad President & CEO Charles Hoffman expects that "bundling will be a major contributor to our growth in 2004 as the demand for line splitting builds momentum"[52] and claims that "Covad is in a unique position to continue driving increased DSL adoption throughout the United States" because of the availability of line

[48] *See Triennial Review Order*, 18 FCC Rcd at 17134, ¶ 259 & n.767.
[49] *FCC Grandfathers Covad Line-Sharing Customers Indefinitely; Covad Continues Focus on Bundling and Small Business Based on FCC Ruling*, Business Wire (Aug. 22, 2003).
[50] Press Release, *VarTec and Excel Select Covad DSL for Their Local/Long Distance Voice and Data Bundles*, Aug. 28, 2003 (quoting Charles Hoffman, President and CEO of Covad).
[51] *Covad Announces 36% Annual Subscriber Line Count Growth*, Business Wire (Jan. 5, 2004).
[52] *Covad Communications Group Announces Third Quarter 2003 Results*, Business Wire (Oct. 22, 2003).

splitting.[53] "'It's not that we've artificially created this market to escape the FCC,'" Covad has insisted, "'We're taking advantage of an already existing market.'"[54]

All of this is entirely consistent with the Commission's determination to consider requesting carriers' revenue opportunities afforded by the "full functionality of the loop"[55] because the Commission's impairment analysis cannot depend on whether "carriers that pursue a particular business strategy are impaired without access to UNEs."[56] To do otherwise would "disregard the availability of scale and scope economies" and "could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."[57] In particular, "rules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service," as well as discouraging innovation and product differentiation – results that would "run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets."[58]

The simple truth is that any customer wishing to purchase broadband service from a competitive LEC can be served via line splitting or using a stand-alone loop.[59] The only thing that has changed is that broadband providers will no longer be permitted to offer their service as

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[53] *Covad Extends Partnership with MCI; New Line Splitting Partnership Enables MCI To Combine Local and Long Distance Services with Covad's DSL High-Speed Internet Service*, Business Wire (Sept. 2, 2003).
[54] Kevin Fitchard, *Covad Signs Line-Splitting Deal with Z-Tel*, TelephonyOnline.com, Aug. 7, 2003 (quoting Andy Lockwood, Executive Vice President and General Manager for Covad strategic partnerships), *at* http://telephonyonline.com/ar/telecom_covad_signs_linesplitting/index.htm.
[55] *Triennial Review Order*, 18 FCC Rcd at 17133, ¶ 258.
[56] *Id.* at 17056, ¶ 115.
[57] *Id.*
[58] *Id.* at 17135, ¶ 261.
[59] *See, e.g.*, Comments of General Communication, Inc. at 16 (FCC filed May 10, 2004) ("GCI Comments") (noting that company's occasional reliance on "unbundled DSL-qualified loops" rather than self-provisioning).

an add-on to incumbents' voice services in the absence of a voluntary commercial arrangement that is acceptable to both parties. Neither Covad nor any other commenter here provides a sound basis for the Commission to revisit its decision.[60]

III. The Commission Should Adopt a Uniform National Broadband Policy

The Commission has explained that "public interest requires common carrier operation" of facilities only where the incumbent operator "has sufficient market power to warrant regulatory treatment as a common carrier."[61] Because local telephone companies lack market power in broadband, there is no justification for continuing to impose Title II and *Computer II/III* regulations on them – especially so long as the Commission declines to impose similar regulations on the cable companies that continue to dominate the broadband mass market.[62] Accordingly, the Commission should therefore declare local telephone companies to be non-dominant in their provision of broadband and should lift the regulations that tend to inhibit the major investments needed to increase broadband deployment. To do so is fully consistent with Congress's instruction, in section 706, to use "regulatory forbearance" to "remove barriers to infrastructure investment" in broadband.

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[60] *See generally* Verizon TRO PFR Response at 41-53.

[61] Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589, ¶ 9 (1998); *see also, e.g.*, Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, 121-22, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on a carrier that had "little or no market power"); *see generally* Michael Kende, Office of Strategic Planning and Policy Analysis Working Paper No. 32, *The Digital Handshake: Connecting Internet Backbones* at 12 (FCC rel. Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[62] Verizon Comments at 23-33; USTA Comments at 8-11.

A. The Commission Should Substantially Deregulate Telephone-Company Broadband

As explained in Verizon's opening comments, the Commission should use the same belt-and-suspenders approach to deregulating telephone-company broadband that it has already applied to cable modem service:

The Commission should clarify that broadband providers are free to offer transmission on a private-carriage, rather than a common-carriage, basis. Although the court in *Brand X Internet Services v. FCC*[63] found that cable modem service offered to end users includes a telecommunications service, the court expressly left untouched the Commission's finding, in its *Cable Modem Declaratory Ruling,*[64] that cable companies may offer transmission to ISPs on a private-carriage basis.[65] As a result, the sale of transmission by cable companies to ISPs is subject to regulation, if at all, only under Title I (*not* because it is an information service, but because it is telecommunications that is being offered on a non-common-carrier basis). In order to level the regulatory playing field, the Commission should declare that telephone companies may also provide broadband transmission on a private carriage basis. *See* Verizon Comments at 27-29.

At the same time, the Commission should waive the *Computer II/III* rules for broadband and should forbear from imposing the Title II common-carrier requirements that might otherwise apply. *Brand X* did not address, much less limit, the Commission's decision to waive the

[63] 345 F.3d 1120 (9th Cir. 2003).
[64] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*").
[65] *Brand X*, 345 F.3d at 1132 n.14 ("[W]e decline here to consider their remaining claims (including those directed at the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis . . .), leaving them for reconsideration by the FCC on remand.").

Computer II/III rules to the extent that they apply to cable modem operators.[66] The Commission thus retains full authority to decline to impose common-carrier regulations that are unnecessary and counterproductive. Specifically, the Commission should eliminate the requirement that carriers must file tariffs. The Commission should also forbear from any requirement under section 201 that rates for broadband services be justified in terms of the cost of providing service. The Commission should make clear that market-based rates are by definition just and reasonable and should allow local telephone companies the freedom to experiment with non-traditional pricing methods (such as revenue sharing or pricing based on the number of clicks or "eyeballs" delivered to customers) that are already being used by cable modem companies and on the Internet. And the Commission should forbear from section 251's collocation and resale requirements in the broadband context. The robust (and increasing) intermodal competition that characterizes the nascent broadband market undermines the basis for imposing the *Computer II/III* rules and the Title II common-carrier regime and plainly satisfies the forbearance standards that the Commission has previously established. *See* Verizon Comments at 29-31.

The Commission can and should do all this while seeking Supreme Court review of the *Brand X* decision. By changing the regulatory classification of broadband offered by telephone companies to match that of broadband offered by cable companies, the Commission would improve the chances of obtaining favorable review of the Ninth Circuit's *Brand X* decision, for at least two reasons: (1) The Commission would eliminate the regulatory disparity that tempted the courts to impose common-carrier rules on cable modem service in the first place; and (2) The Commission could argue that competition in the broadband marketplace makes common-carrier regulation of cable unnecessary. Courts have consistently accepted this rationale for declining to

[66] *Brand X*, 345 F.3d at 1132 n.14.

impose common-carrier obligations on carriers in the past, but the Commission could not make this highly persuasive argument in defense of its cable modem classification while it continued to impose common-carrier regulations on the telephone companies that are minority players in the broadband market. *See* Verizon Comments at 31-33.

By putting an end to the disparate regulatory burdens imposed on telephone companies in their provision of broadband, the Commission will allow healthy intermodal competition to drive broadband deployment to all Americans.[67]

B. No Commenter Provides Any Sound Ground for Continuing the Disparate Regulation of Broadband Provided by Telephone Companies

Comcast praises the Commission's *Cable Modem Declaratory Ruling* because "[b]y rejecting calls to impose common carrier requirements on high-speed cable Internet service . . . the Commission allowed cable operators to focus on investing in competitive facilities and delivering the services that consumers want."[68] "This same ruling," Comcast points out, "also provided reassurance to wireless, satellite, and other providers that they, too, can pursue broadband investments without being *saddled with unnecessary government regulation.*"[69]

Unfortunately, the same cannot be said of local telephone companies, who continue to be saddled with numerous unnecessary regulations that none of their competitors have to contend with, despite the fact that – in Comcast's words, again – "the growing competition in this

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[67] *See also* SBC Comments at 11-13, 19-20; USTA Comments at 8-11; *cf.* Comments of Nortel Networks at 8 (FCC filed May 10, 2004) ("Nortel Comments") ("Speedy resolution of [the Commission's pending broadband] proceedings would be a major positive step in accelerating the deployment of advanced telecommunications capability to all Americans, thereby meeting the objectives of the 1996 Act.").
[68] Comcast Comments at 16.
[69] *Id.* (emphasis added).

marketplace has eliminated any arguable justification for regulation."[70] Nevertheless, some commenters continue to flail for any excuse to maintain inappropriate, and competitively harmful, common-carrier regulations on telephone companies in their provision of broadband.

For instance, AT&T makes much of its claim that VoIP can serve as a "major driver of incremental broadband growth,"[71] as if this statement somehow supported the proposition that the FCC should maintain or increase regulation of broadband provided by local telephone companies. On the contrary, VoIP providers such as Vonage, Skype, and AT&T itself are already operating successfully over broadband infrastructure provided by cable companies and telephone companies alike – as are various independent ISPs and other content providers. No broadband provider has attempted to restrict the use of these services, nor does any broadband provider have an incentive to do so. The notion, advanced by some commenters, that independent content providers somehow depend on line-sharing competitive LECs in order to reach their customers is mistaken.[72] As noted above, line sharing accounts for a competitively insignificant fraction of the broadband market. Moreover, the recent decision by America OnLine ("AOL") to phase out its sales of broadband transmission and to focus instead on providing online content and services confirms that broadband transmission is becoming decreasingly relevant to the plans of companies with Internet-based content offerings.[73] As none other than AT&T itself correctly said less than two years ago, "Title II regulation is not

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[70] *Id.*
[71] AT&T Comments at 10.
[72] *See, e.g.*, MCI Comments at 13.
[73] K. Fitchard, *AOL gets out of the broadband access biz*, TelephonyOnline.com, Mar. 1 2004 ("'We're phasing out connectivity because what we do best are services and features,' [an AOL] spokeswoman said. 'We're focusing on what broadband users want, and we can offer a lot more of those things if we're not aggregating these different access services.'"), *at* http:// telephonyonline.com/ar/telecom_aol_gets_broadband/index.htm.

necessary to ensure just and reasonable charges or to protect consumers. Moreover, inflexible government intervention would only undermine the pro-competitive commercial experimentation that will ensure optimal solutions to the many technical and operational issues raised by multiple ISP access."[74]

Some parties attempt to argue that international examples provide grounds for maintaining or increasing common-carrier regulations on telephone-company broadband, but the facts do not support this argument. MCI claims that a "lesson" to be learned from South Korea, for instance, is "the importance of open access to existing local networks."[75] Yet MCI itself acknowledges that, in South Korea, DSL "is *not* characterized by open access to the existing telephone infrastructure."[76] And although South Korea has a tradition of leasing cable infrastructure, it appears that the lease agreements are made on privately negotiated terms, without government ratesetting (much less a mandate for TELRIC prices). "Vigorous infrastructure competition within and between ADSL and cable modem networks has been heralded as the single factor which has brought down prices and established Korea's lead" in broadband penetration.[77] This only serves to confirm the principle that makes our own economy the largest and most robust in the world: private investment in free markets provides the soundest basis on which to drive new facilities and services to all Americans in the most efficient manner possible.

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[74] Comments of AT&T Corp. at 53, GN Docket No. 00-185, CS Docket No. 02-52 (FCC filed June 17, 2002).
[75] MCI Comments at 27.
[76] *Id.* at 26 (emphasis added).
[77] *See, e.g.*, G. Campbell, *et al.*, Merrill Lynch, *Broadband Handbook* at 10 (Feb. 21, 2003); T. Keidrowski, InterMedia, *A Model for Broadband Success?* (Dec. 2002), *at* http://www.iicom.org/intermedia/dec02/keidrowski.html.

Finally, the Commission should ignore AT&T's attempt to revive an old debate about whether broadband deployment is a "demand" issue or a "supply" issue. The gist of AT&T's argument here is that because cable and DSL are widely available, deployment of broadband is basically done, so no regulatory relief for telephone companies is needed in order to stimulate further investment.[78] This argument is flawed on a number of levels. First, the facts are that broadband supply and demand both accelerated in the wake of the initial deregulatory steps the Commission announced in the *Triennial Review Order*, as AT&T in effect concedes.[79] The lesson from those statistics should be that unleashing market forces in broadband is good for both supply and demand. Second, deployment of next-generation, fiber-based networks is just beginning. Verizon is investing more than a billion dollars this year alone. To suggest, as AT&T implicitly does, that no more investment in broadband facilities is needed, ignores the rapid rate of technological advances in this industry. The Commission appropriately cited its "obligation to ensure adequate infrastructure investment incentives pursuant to section 706" as a significant factor underpinning the deregulatory aspects of its *Triennial Review Order*, and that same obligation calls for additional regulatory relief.[80] Third, the fact that telephone companies have made substantial investments in broadband *despite* the severe regulatory disparities under which they must operate, as compared to other broadband providers, does not justify continued disparate treatment, as AT&T supposes. Ultimately, continued investment cannot be sustained if

[78] AT&T Comments at 1.
[79] *See* AT&T Comments at 15 ("[T]he data for the second half of last year and the first quarter of 2004 show that there has been a significant 'up tick' in demand for high-speed data services, especially for DSL.").
[80] *Triennial Review Order*, 18 FCC Rcd at 17122, ¶ 236; *see also id.* at 16984, ¶ 3 ("The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.").

regulatory barriers inhibit a return on that investment. Moreover, the Telecommunications Act of 1996, the Administrative Procedure Act, and the First and Fifth Amendments to the United States Constitution all require that broadband providers be regulated alike, regardless of which platform they use to provide service.[81]

Even Sprint acknowledges that "[r]egulation is warranted in markets which are not behaving in a competitive manner. There has been no demonstration here that the market for advanced services has failed, and consequently no intervention is necessary."[82] For precisely that reason, the continued asymmetrical regulation of broadband service provided by telephone companies is not only unnecessary, but counterproductive and indefensible.[83]

IV. The FCC Should Pre-Empt State and Local Regulation of Broadband

The Commission should pre-empt states or local units of government from regulating broadband services either directly (as by requiring carriers to obtain a franchise in order to provide broadband service) or indirectly (as by imputing revenues from broadband to other regulated services). The Commission has done so with success in other sectors of the telecommunications industry, including customer premises equipment ("CPE"), information services, and wireless services.

In each of those cases, the Commission established a deregulatory national policy and pre-empted inconsistent regulation on the grounds that such regulation could impose undue burdens on market participants and would interfere with the Commission's deregulatory mission.

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[81] *See* Verizon Comments at 24-26; *see also* Comments of Verizon at 23-30, WC Docket No. 02-33 (FCC filed May 3, 2002).
[82] Comments of Sprint Corp. at 3 (FCC filed May 10, 2004) ("Sprint Comments").
[83] Although Sprint actually supports the current asymmetric regulatory regime for broadband, *see id.*, its own comments about when regulation is warranted underscore the manifest injustice of the current system.

In the Commission's own words: "While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become . . . a burden to the development of this competition."[84] The D.C. Circuit has upheld such decisions, saying that "when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."[85]

The principles supporting adoption of a truly national policy in these cases also require it here. Otherwise, state and local authorities could undermine, or directly contradict, the Commission's own national policies governing broadband, leaving broadband providers subject to a patchwork of conflicting regulations. If broadband providers must modify their networks and support systems to conform to different rules in different places, broadband becomes more costly and inefficient to deploy and operate. As explained in Verizon's opening comments, because broadband is predominantly interstate,[86] and because separately regulating the interstate and intrastate components of broadband (if it is even possible) would undermine the Commission's efforts to remove regulatory disincentives to broadband investment, pre-emption is appropriate. Broadband services thus present a classic example of when compliance with both

[84] Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421, ¶ 23 (1994).
[85] *Computer & Communications Indus. Ass'n. v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (footnotes omitted).
[86] The Commission has correctly found that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, ¶ 59. The same is, of course, true of mass-market broadband provided over other platforms.

state and federal regulation, even if technically possible, is unlikely due to operational and economic considerations. *See* Verizon Comments at 34-35.

The Commission should also take positive steps to ensure that broadband providers have reasonable access to public rights of way. The President recently emphasized the importance "timely and cost-effective access to rights-of-way" to promote broadband deployment,[87] and Commission officials, including Chairman Powell, have recognized for years that restrictions relating to rights of way, zoning, and building codes "are some of the most vexing problems in bringing new services to consumers."[88] Although state and local governments have an important role in managing true rights-of-way issues – *e.g.*, managing the time, place, and manner of entry onto public property in order to minimize the disturbance to the public in the construction of broadband facilities – the Commission vigilantly pre-empt efforts to use issues as a prextext for regulating broadband at the state or local level. Such regulations inevitably increase costs and delay deployment; at their worst, they can prevent large segments of the public from receiving broadband services. The costs and inefficiencies associated with inappropriate restrictions on or procedures relating to access to public rights of way are significant and should be addressed at the national level.[89]

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[87] President George W. Bush, *Broadband Rights of Way Memorandum* (White House Press Release Apr. 26, 2004), *available at* http://whitehouse.gov/news/releases/2004/04/20040426-2.html.
[88] Michael K. Powell, *Remarks at the National Summit on Broadband Deployment* (Oct. 25, 2001), *at* http://www.fcc.gov/Speeches/ Powell/2001/spmkp110.html.
[89] *See* Verizon Comments at 33-36.

V. The Commission Should Adopt an Inclusive Definition of Broadband

Verizon has argued that broadband service should be defined broadly to include *either* a service that uses a packet-switched or successor technology,[90] *or* a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions.[91] Some commenters have suggested redefining broadband to include services that operate at much higher speeds – 10 Mbps, or even a remarkable 1 Gbps.[92] The effect of this change would be to exclude existing DSL and cable modem services from the definition of broadband even though, as the Commission has recognized, speeds of 200 kbps are sufficient to "provide the most popular forms of broadband – to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video."[93] Verizon believes that to radically redefine broadband at much higher speeds would fail to do justice to the extraordinary social, commercial, and civic benefits that current-generation broadband has brought to millions of Americans. Nevertheless, Verizon recognizes that there may be some benefit on tracking the deployment of faster, next-generation services, even as the Commission considers rationalizing

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[90] *Cf.* Comments of IEEE-USA ¶ 8 (FCC filed May 10, 2004) ("IEEE Comments") ("The Commission further inquires whether any other attributes, besides speed, are relevant to the definition of advanced telecommunications capability. We submit that the most significant additional attribute is Internet Protocol (IP) compatibility.").

[91] This definition does not include: (1) traditional non-packet-switched data services, such as 56 kbps and 1.5 Mbps services, regardless of whether these services are provided over copper or fiber infrastructure; (2) lower-speed data services that are based on circuit technology, such as ISDN; (3) x.25-based and x.75-based packet technologies; or (4) circuit switched services (such as circuit-switched voice-grade service) regardless of the technology, protocols, or speeds used for the transmission of such services.

[92] *See, e.g.*, Comments of Optoelectronics Industry Development Association at 4 (FCC filed May 7, 2004); Comments of One Gigabyte or Bust Initiative, CENIC at 6-7 (FCC filed May 7, 2004); Nortel Comments at 2-4; IEEE Comments ¶¶ 3-8.

[93] *First Advanced Services Report*, 14 FCC Rcd at 2406, ¶ 20 (1999).

its existing data collection scheme.[94] Verizon looks forward to providing more detailed comments on data collection in response to the Commission's separate proceeding on that topic.[95]

Conclusion

In fulfillment of its mandate under section 706 of the Telecommunications Act of 1996, the Commission should establish a uniform, national, deregulatory broadband policy that would allow all broadband providers to compete on an equal regulatory footing and subject to clear rules.

Respectfully submitted,

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[94] *See also* SBC Comments at 8 ("The Commission will need to strike an appropriate balance, however, between gathering additional information and imposing undue administrative burdens on broadband providers through its data reporting requirements.").

[95] *See generally* Notice of Proposed Rulemaking and Order on Reconsideration, *Local Telephone Competition and Broadband Reporting*, WC Docket No. 01-141, CC Docket No. 99-301 (FCC rel. Apr. 16, 2004).

ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.